

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SANDRA HORVITZ AND JOHN C. HORVITZ	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NOS. 811868
Refund of New York State and New York City	:	AND 811876
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Year 1986.	:	

Petitioners, Sandra Horvitz and John C. Horvitz, 77 Park Avenue, New York, New York 10016, each filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1986.

Upon two notices of motion¹ dated October 8, 1993, the Division of Taxation by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel) moved for summary determination. The motions were returnable November 14, 1993. Petitioners did not file any responsive papers. Based on the affidavits of Christina L. Seifert, Donna Biondo, Daniel LaFar and Martin Dolan, and exhibits attached thereto, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners made a request for a conciliation conference within 90 days of the issuance of the notices of deficiency.

¹The Division of Taxation filed two motions, one with respect to the petition of Sandra Horvitz and one with respect to the petition of John C. Horvitz. The motion papers contain identical affidavits and exhibits with the exception that each refers to the separate petition, Notice of Deficiency and mailing record of the respective petitioners.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to Sandra Horvitz a Notice of Deficiency, dated October 16, 1989, for income tax due in 1986 in the amount of \$4,964.50, plus penalty and interest. The Division also issued to John C. Horvitz a Notice of Deficiency, dated October 16, 1989, for income tax due in 1986 in the amount of \$5,084.40, plus interest and penalty.

On December 10, 1992, petitioners each mailed separate requests for a conciliation conference. The Bureau of Conciliation and Mediation Services ("BCMS") received those requests on December 14, 1992. In support of these facts, the Division submitted with its motion papers: (1) copies of the requests for a conciliation conference, stamped received by the BCMS on December 14, 1992 and (2) copies of the envelopes addressed to the BCMS from Horvitz & Associates, Inc. with a U.S. Postal Service stamp dated December 10, 1992 and a BCMS stamp indicating receipt on December 14, 1992.

By conciliation orders dated February 5, 1993, the conferee dismissed the two requests because the underlying notices of deficiency were issued on October 16, 1989 and the 90-day period for requesting a conference had expired.

Petitioners filed separate petitions, dated May 4, 1993, containing identical allegations. Among those allegations was the following:

- "4. On July 13, 1989, New York State Department of Taxation and Finance issued a statement of personal income tax audit changes assessing the minimum tax, interest and a negligence penalty. Taxpayer did not understand the reason for the assessment and wrote to New York State requesting further explanation.
- "5. New York State did not respond to taxpayer's request except to continually send collection notices. Upon receipt of each notice taxpayer responded to New York State that he needed an explanation for the assessment before tax could be paid.
- "6. Finally on May 9, 1991, more than a year and a half after the taxpayer initially requested an explanation for the assessment the state provided an explanation of the minimum tax assessment. Upon receipt of this correspondence, taxpayer ascertained that the assessment of additional minimum tax was correct and promptly paid additional tax plus interest to date on June 13, 1991.

- "7. Taxpayer requested elimination of penalties for negligence (Sec. 685(b)) and failure to pay tax timely (Sec. 685 (a)(2)) due to reasonable cause. The negligence penalty should be eliminated due to reasonable cause since the taxpayer engaged and relied on a professional accountant to prepare his returns properly (see matter of Phoenix, TSB-H-86 (109)). The penalty for failure to pay timely should be eliminated since the state did not respond promptly to the taxpayers [sic] request for explanation of assessment. When explanation was finally provided, taxpayer promptly paid tax and interest."

The Division filed these motions for summary determination pursuant to 20 NYCRR 3000.5(c)(1) before the Division of Tax Appeals on October 13, 1993. In the affidavits of Christina Seifert, she states that summary determination is warranted on the ground that petitioners failed to file a request for a hearing or conciliation conference within 90 days of the issuance of the notices of deficiency.

In the affidavits of Donna Biondo, she stated that she supervises the processing of notices of deficiency prior to mailing; that a certain mail record is printed and records the certified control number printed on each notice that is to be mailed; and that the certified mail record is delivered, along with the notices that it records, to the U.S. Postal Service where it is affixed with a U.S. Postal Service postmark or initialed by a Postal Service representative. Attached to Ms. Biondo's affidavits was a copy of an eight-page certified mail record, the first page of which contains the certified number P 001 060 708 next to the name and address of John C. Horvitz, 77 Park Ave. #6F, New York, NY 10016, and the certified number P 001 060 709 next to the name and address of Sandra Horvitz, 77 Park Ave. #6F, New York, NY 10016. The mailing record consists of eight consecutively numbered pages with consecutive certified numbers starting on page one with the certified number P 001 060 701 through certified number P 001 060 785 on the last or eighth page. The last page contains the handwritten notation "85" and initials next to the printed words "Total Pieces received at post office." The last page also contains a U.S. Postal Service stamp with the date October 16, 1989.

In the affidavits of Daniel LaFar, he stated that he has been the principal mail and supply clerk since 1978 and is fully familiar with the operations and procedures of the mail and supply room. He described these procedures as follows: a member of the staff weighs and seals each envelope, places postage and fee amounts on the letters, records the postage and fee amounts on

the mail record, counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record, and delivers the stamped envelopes to the U.S. Postal Service where a postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service.

In the affidavits of Martin Dolan, he stated that as part of his regular duties he oversees the daily computer operations of the Division's computer system, which stores information and generates printed documents including notices of deficiency that are sent to taxpayers. He explained that it is the Division's regular business practice to retain microfiche copies of statutory notices for "the purposes of reducing paper usage and the amount of personal resources devoted to the filing of hard copies of statutory notices." He further described the manner in which the microfiche copies of statutory notices are generated and retained by the Division. Attached to his affidavits were the microfiche copies of the notices of deficiency sent to Sandra Horvitz and John C. Horvitz, respectively. In the upper right hand corner of these copies are the certified mail numbers corresponding to the certified numbers printed next to the respective names of Sandra and John C. Horvitz on the certified mail record.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) provides that if the Division determines there is an income tax deficiency, it must mail a Notice of Deficiency to the taxpayer at his or her last known address by certified or registered mail. If such notice is properly mailed, it shall constitute a final assessment unless the taxpayer files a petition protesting the notice within 90 days of the mailing of the notice (Tax Law § 681[b]; see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025; cf., Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517). The taxpayer has the option of protesting the notice by requesting a conciliation conference in lieu of filing a petition for hearing (Tax Law § 689[b]) if the 90-day period to petition for hearing has not elapsed (Tax Law § 170.3-a[a]; 20 NYCRR 4000.3[c]).

When the timeliness of a filed petition is at issue, the Division must demonstrate proper mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). To show that the notices were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and evidence that this procedure was adhered to with respect to the notice in question (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*).

Here, the Division provided evidence in the form of affidavits wherein the affiants, who were familiar with the processing and mailing procedures concerning notices of deficiency, explained what those procedures were. In addition, the Division provided exhibits which evidenced that these procedures were followed with respect to the two notices in question and that these notices were mailed on October 16, 1989. The certified mailing record contains the names and address of petitioners and the certified numbers next to their respective names on that record correspond to the numbers on the microfiche copies of the respective notices. Although the postal stamp does not appear on the first page containing petitioners' names, it appears on the last page of the eight-page record which also contains the handwritten initials and notation "85" next to the printed lines "total pieces and amounts listed" and "total pieces received at the post office." The number "85" corresponds with the total number of certified-numbered items listed on the eight-page mailing record.

Although there are cases where the Division's mailing record has not been accepted as adequate proof of mailing, the facts in those cases are distinguishable. Unlike the situation in Matter of MacLean v. Procaccino (53 AD2d 965, 386 NYS2d 111), the Division provided evidence, in addition to the mailing log, such as affidavits describing the regular business practices of the Division with respect to mailing notices and with respect to the mailing record, as well as a postal stamp on the mailing record itself. Similarly, the present case differs from the facts in Matter of Katz (*supra*). In Katz, a postal stamp on the last page of a mailing record was not accepted as proof of mailing with respect to other unstamped pages because (1) there

was no indication on the stamped page that that page related to the unstamped pages, (2) there was no indication on the stamped page as to the total number of documents received by the Post Office, and (3) the stamped page indicated that some notices listed were withdrawn without noting which ones. Here, the mailing record contained eight consecutively numbered pages which, in turn, listed 85 consecutively numbered certified items. On the last page, which contains the postal stamp, an initialed notation indicated that 85 items were accepted by the Post Office for certified mailing on October 16, 1989. Given these distinguishing facts, it is concluded that the Division provided adequate proof that it mailed the notices of deficiency to the respective petitioners by certified mail on October 16, 1989.

B. The Division also provided proof that petitioners did not file requests for a conciliation conference until December 10, 1992 -- the date stamped by the Post Office on the envelopes containing the requests. Thus, the Division has proved that the Division of Tax Appeals has no jurisdiction to hear this case inasmuch as petitioners had not filed requests for a hearing or conference within 90 days of the issuance of the notices of deficiency.

C. The next issue is whether summary determination should be granted on the Division's motion. A party moving for summary determination must show that there are no material issues of fact and that the only issues involve questions of law (see, 20 NYCRR 3000.5[c]). Such showing can be made by "tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University, 64 NY2d 851, 853, 487 NYS2d 316, 317, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary determination is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dalleck v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179).

Here, the Division provided sufficient evidence in support of the fact that petitioners did not file requests for a conference within 90 days of the issuance of the notices of deficiency. Petitioners have not responded to the Division's motion papers. In their petitions, they do not

appear to dispute these facts, but instead appear to raise only a legal issue concerning reasonable cause for abatement of the penalties.

Thus, there are no material issues of fact in dispute with respect to whether petitioners filed timely requests for a conciliation conference or hearing. Petitioners state in their respective petitions that:

"[t]he penalty for failure to pay timely should be eliminated since the state did not respond promptly to the taxpayers [sic] request for explanation of assessment."

The fact that the Division may not have promptly responded to petitioners' requests for an explanation of the asserted tax deficiencies does not excuse petitioners' failures to file timely requests for a hearing or conciliation conference, or, in any way, provide a legal basis to defeat summary determination in the Division's favor on this threshold jurisdictional issue. Based on the foregoing, the Division is entitled to summary determination in its favor.

D. The motion for summary determination by the Division is granted and the petitions of Sandra Horvitz and John C. Horvitz are dismissed.

DATED: Troy, New York
December 16, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE